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State of Utah v. Elmer R. Mondragon, Jr., Ronnie J. Manzanares, Casey J. Cutler : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	*		
Appellee,	*		
vs.	*	Case No.	960757-CA 960778-CA
ELMER R. MONDRAGON, Jr., RONNIE J. MANZANARES, and CASEY J. CUTLER, .	*		960777-CA
	*	Priority 10	
Defendants and Appellants.	*		

BRIEF OF APPELLANTS

An Interlocutory Appeal from a Memorandum Decision
From a Suppression Hearing,
with the Honorable Ben H. Hadfield Presiding
First District Court

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JURISDICTION AND NATURE OF PROCEEDING

This is an interlocutory appeal from an order from the First District Court, Judge Ben H. Hadfield, denying the Defendants' Motion to Suppress. The Defendants face two counts of Possession of a Controlled Substance, a Third Degree Felony, in violation of U.C.A. § 58-37-8 (1953 as amended) and one count of Possession of a Controlled Substance, a Class A Misdemeanor, in violation of § 58-37-8 (1953 as amended). The District Court Judge found that there was no reason to suppress the evidence from the search. The Defendants cases were stayed pending the result of this appeal.

Jurisdiction to hear the above-entitled appeal was conferred upon the Utah Court of Appeals pursuant to U.C.A § 78-2a-3(2) (1953 as amended).

STATEMENT OF ISSUES PRESENTED ON APPEAL

AND STANDARD OF REVIEW

POINT I

Are the trial court's findings of fact, that underlie the memorandum decision on the Suppression hearing, clearly erroneous and thus reversible error?

STANDARD OF REVIEW

In reviewing the trial court's findings of fact, clear error will be found only when the trial court's factual findings run against the clear weight of the evidence. State v. Patefield, 927 P.2d 655, 657 (Utah App. 1996). The trial court's findings of fact will not be reversed unless clearly erroneous. State v. Thurman, 846 P.2d 1256, 1271-72 (Utah 1993).

POINT II

Were the trial court's conclusions that the Defendant gave voluntary consent to search the vehicle and that the officer had reasonable suspicion correct?

STANDARD OF REVIEW

The Court of Appeals reviews the trial court's legal conclusions based on the facts for correctness according no deference to the trial court's conclusions. State v. Patefield, 927 P.2d 655, 657 (Utah App. 1996), State v. Yates, 918 P.2d 136, 138 (Utah App. 1996). Further, determination of whether a specific set of facts gives rise to reasonable suspicion is a determination of law and is reviewed nondeferentially for correctness. State v. Bello, 871 P.2d 584, 586 (Utah App. 1994).

POINT III

Was the interrogation of Cutler and Manzanares intrusive, beyond the scope of the stop, without probable cause and a violation of their constitutional rights against search and seizure?

STANDARD OF REVIEW

The Court of Appeals reviews the trial court's legal conclusions based on the facts for correctness according no deference to the trial court's conclusions. State v. Patefield, 927 P.2d 655, 657 (Utah App. 1996), State v. Yates, 918 P.2d 136, 138 (Utah App. 1996). Further, determination of whether a specific set of facts gives rise to reasonable suspicion is a determination of law and is reviewed nondeferentially for correctness. State v. Bello, 871 P.2d 584, 586 (Utah App. 1994).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE

United States Constitution, Fourth and Fourteenth Amendment

See addendum B.

Utah Constitution, Article I Section 14

See addendum B.

U.C.A. § 58-37-8

See addendum B.

U.C.A. § 78-2a-3 (2)

See addendum B.

STATEMENT OF THE CASE

The Defendant, Elmer Mondragon ("Mondragon") was pulled over by a Utah Highway Patrol Trooper, for speeding and failure to signal. Incident to the stop, the Trooper searched the

car, the trunk and the passengers without voluntary consent. The Defendants filed Motions to Suppress, a hearing was held on the Suppression Motions at the First District Court of Box Elder County, before Judge Ben H. Hadfield. The Suppression Motions were denied and the Defendants appeal the Memorandum Decision and Order.

STATEMENT OF FACTS WITH REFERENCE TO THE RECORD

On September 22, 1995, at approximately 1:35 p.m., Trooper Singleton ("Trooper") was traveling on southbound I-15 when he paced a Monte Carlo traveling seven miles-per-hour over the speed limit. (R. 4-6). The Trooper stopped the vehicle and obtained the valid drivers license and registration from the driver, the Defendant Mr. Mondragon ("Mondragon"). The Trooper placed Mondragon's drivers license and registration in the pocket of his uniform. The Trooper did not proceed to run an NCIC check on the driver or the vehicle, nor did the Trooper proceed to complete a citation for speeding and failure to signal. (R. 23). Instead, the Trooper initiated questioning of the driver in regard to an alleged odor of burnt tobacco. (R. 7).

The Trooper asked if anyone in the car was nineteen (19) years old. One passenger, the Defendant Casey J. Cutler ("Cutler"), indicated that he was, but he did not provide identification to prove it. (R. 7,18, 22).

With Mondragon's drivers license and registration retained in the Trooper's uniform pocket, the Trooper requested to search the passenger compartment of the car for tobacco. Mondragon allegedly consented to the search. (R. 8).

The Trooper requested that Mondragon get out of the car, the Trooper did a pat down frisk on Mondragon and ordered that Mondragon stand in front of the vehicle. (R. 8). The Trooper requested the passenger in the front seat, Defendant Ronnie J. Manzanares

("Manzaneres") to exit the vehicle. The Trooper performed a pat down search on Manzanares, requested his name, identification and the Trooper ordered Manzanares to stand in front of the vehicle. (R. 8). The Trooper requested the back seat passenger, Defendant Casey Cutler, to exit the vehicle and performed the same routine on Cutler. (R. 8).

The Trooper did a pat down frisk on Cutler and believed he felt a wallet. The Trooper requested Cutler to remove his wallet and the Trooper proceeded to open Cutler's wallet. The Trooper located Cutler's drivers license in the wallet. The license revealed Cutler's birth date of June 06, 1972. However, the Trooper testified his math skills were not good and that it would take him "quite a while" to figure out Cutler's age. (R. 16). After, obtaining Cutler's identification, the Trooper asked if Cutler had any outstanding warrants. Cutler stated he had a warrant outstanding in Salt Lake County. After, obtaining this information, the Trooper pocketed the identification, ordered Cutler to stand at the front of the vehicle with the other two Defendants, and the Trooper continued on with the search of the vehicle. (R. 18, 23, 28).

The Trooper found no contraband in the car. After the search, the Trooper ordered the Defendants to return to the vehicle. (R. 32). At the time the Defendants were requested to return to the vehicle, the Trooper still had possession of the Defendants' identification. (R. 32). The Trooper testified that at no time did he have an articulable suspicion of the Defendants committing any criminal activity. (R. 32-33).

The Trooper turned to go back to his patrol car, paused, and then returned again to Mondragon and ordered Mondragon to "pop" the trunk to allow the Trooper to look at the alleged defective taillight. (R. 20, Video). Mondragon hesitated and stated that he would get the taillight checked out in Salt Lake City. (R. 19). The Trooper disregarded Mondragon's request

and again ordered Mondragon to open the trunk. When the trunk was opened the Trooper and Mondragon looked at the taillight box and determined that access was too difficult without the proper tools. (R. 20).

The Trooper then moved to the left of Mondragon and made inquires in regard to the a duffel bag contained in the trunk. (R. 21-22). The Trooper asked to whom the duffel bag belonged. Mondragon stated that it belonged to everyone. (R. 13). The Trooper proceeded to question Mondragon regarding the contents of the duffel bag. The Trooper was concerned that there was tobacco in the bag because of the Trooper's observation of a strong smell of fresh burnt tobacco at the inception of the stop and because of the "absolute absence of any smoking material in the driver's compartment. (R. 13-14, 22). The Trooper stated it made sense the tobacco could be in the trunk. Therefore, the Trooper asked Mondragon if he could look inside the duffel bag. Mondragon allegedly stated yes. This consent was after the Trooper had taken the three occupants out of the car, searched each one with a pat down frisk, completed a search of the passenger compartment of the vehicle, and was without having written a citation or returning the Defendants' identification. (R. 13-14, 22-24)

Upon search of the duffel bag the Trooper found controlled substances and placed the three Defendants under arrest.

The Defendants requested a Suppression Hearing and the State provided evidence and testimony of the Trooper. The Defendants' provided a copy of the video made by the Trooper's patrol car video equipment. (R. 15, 33). The trial court took the evidence and argument under advisement and issued a memorandum decision denying the motion to suppress. The Defendants' appeal the memorandum decision.

SUMMARY OF THE ARGUMENT

The Trooper's misconduct expanded the scope of the detention beyond the purpose which justified the detention. Such intrusion violated the Appellants' constitutional rights to be free from unwarranted search and seizure under the Fourth Amendment, Fourteenth Amendment of U.S. Constitution, and Article I Section 14 of the Utah Constitution.

ARGUMENTS

POINT I

THE TRIAL COURT'S FINDINGS IN THE MEMORANDUM DECISION AND ORDER ARE CLEARLY ERRONEOUS AND SHOULD BE REVERSED

The trial court's findings in the Memorandum Decision and Order, from the Suppression Hearing, are in error and do not accurately reflect the facts surrounding the incidents leading to the search and arrests.

Utah case law establishes that the trial court's findings of fact that underlie its determination will not be reversed unless clearly erroneous. State v. Ziegleman, 905 P.2d 883, 885 (Utah App. 1995). This Court found that clear error will be "found only when the trial court's factual findings run against the clear weight of the evidence." State v. Patefield, 927 P.2d 655,657 (Utah App. 1996).

In the present case the trial court found that:

> Trooper Singleton then pulled the vehicle over. During the discussion which followed, it was determined Elmer Mondragon was the owner/driver of the vehicle and that he had a valid driver's license. Additionally, it was determined that Casey J. Cutler was one of the passengers and there was an outstanding warrant for his arrest. The officer had the defendants assist him in testing the turn signals and brake lights and determined that neither the turn signals nor the brake lights

> were working on the rear of the vehicle, although apparently the turn signals did work on the front of the vehicle. Because the front lights worked, the officer theorized that a fuse was not out but that perhaps there was a problem with wiring or a light bulb. The defendant opened the trunk of the vehicle and it was determined that the taillights were enclosed in such a way that tools would be required in order to gain access to the bulbs. At that time, a single duffel bag was observed in the trunk of the car and the officer asked Mondragon if he could look in the duffel bag. Mondragon said he could.

(See addendum C). The trial court in the above findings completely omitted the officer's actions in obtaining Mondragon's consent to the search and in maintaining possession of Cutler's identification. The trial court failed to discuss and recite the relevant facts leading up to the officer's testing of the turn signals and the officer's illegal entry into the trunk.

The trial court focused only upon the facts surrounding the alleged consent and search of the duffel bag without a proper analysis of the total circumstances. The trial court failed to analyze the following:

a) the initial stop when the Trooper expanded the scope of the stop to inquire if the Appellants were of legal age to possess tobacco (R. 7,8);

b) the Trooper's misconduct in continuing the search of the car once the Trooper discovered that there was an individual old enough to possess tobacco (R. 18,23,28);

c) how the Trooper obtained entrance into the trunk. The trial court determined that the Appellant opened the trunk of the vehicle, nothing more (R. 19,20);

d) finally, the trial court did not support its conclusion of how or why the court found the Appellant's action of opening the trunk was voluntary.

Upon review of the facts, the Appellants assert the Court will find clear error in the correctness of the facts. As such, the Appellants request that the Court find that the trial court's factual findings run against the weight of the evidence and reverse the trial court's findings of fact. State v. Ziegleman, 905 P.2d 883, 885 (Utah App. 1995).

POINT II

TROOPER SINGLETON UNLAWFULLY EXTENDED MR. MONDRAGON'S DETENTION BEYOND THE PURPOSE WHICH JUSTIFIED THE DETENTION.

Utah Code Annotated § 77-7-15 specifically delineates a peace officer's authority to detain suspects. That section provides,

> A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of evidence or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

Thus, by statute, an officer's authority at a traffic stop is limited to obtaining the suspects name, address, and an explanation of his actions relating to the stop. The statute does not explicitly limit an officer to demanding only those "explanations" that relate to the purpose of the stop. However, extensive case law makes very clear the point that an officer is limited to investigating, or seeking "explanations," that relate to the purpose of the stop. An officer, for example, who has stopped a suspect for speeding is not authorized to demand information concerning matters unrelated to the speeding offense. This is exactly what occurred in the present case, and this point is addressed more fully below.

The Tenth Circuit has held that "[a]n officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation." United States v. Guzman, 864 F.2d 1512, 1519 (10th Cir. 1988); United States v. Walker, 933 F.2d 812, 815 (10th Cir. 1991). "When the driver has produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning." Id. "[F]urther questioning and the concomitant detention of a driver are permissible in either of two circumstances: (1) during the course of the traffic stop the officer acquires an objectively reasonable and articulable suspicion that the driver is engaged in illegal activity, or (2) the driver voluntarily consents to the officer's additional questioning." United States v. Sandoval, 29 F.3d 537, 540 (10th Cir. 1994).

The Utah Supreme Court has held, in State v. Lopez, 873 P.2d 1127 (Utah 1994), that an officer's traffic stop must retain a "reasonable scope," "last[ing] no longer than is necessary to effectuate the purpose of the stop." Id., at 1132 (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)). The court further stated,

> The purpose of the stop is to request a driver's license and a valid registration, run a computer check on the car and/or the driver, and issue a citation. Unsupported by further probable cause or reasonable suspicion, inquiries by the officer to investigate suspicions unrelated to the traffic offense unconstitutionally extend the detention beyond the scope of the circumstances that rendered it permissible. Thus, existing Fourth Amendment law precludes an officer from extending the length or scope of a traffic stop to investigate a suspicion of wrongdoing which does not rise to the level of probable cause or reasonable suspicion.

Id. (emphasis added). Furthermore, the Utah Court of Appeals "has recognized that '[a]n officer conducting a routine traffic stop may request a driver's license and vehicle registration, conduct a computer check, and issue a citation'. . . Moreover, '[t]he officer may also check for outstanding

warrants 'so long as it does not significantly extend the period of detention. . . 'Any further temporary detention for investigative questioning after the fulfillment of the purpose for the initial traffic stop is justified under the fourth amendment only if the detaining officer has a reasonable suspicion of serious criminal activity.'" State v. Patefield, 927 P.2d 655, 658-9 (Utah App. 1996).

If an officer violates this constitutional rule, and extends the length or scope of a stop beyond the lawful purposes of the stop, then the detention becomes illegal, Terry v. Ohio, 392 U.S. 1 (1968), and the evidence obtained as a result of that illegality becomes suppressible under Wong Sun, 371 U.S. 471 (1963).

To demonstrate the importance of this rule, and the severity of the consequences of breaking it, it is helpful to refer to two cases that have come out of the Tenth Circuit. First, in United States v. Guzman, 864 F.2d 1512, 1516 (10th. Cir. 1988), the court noted that even an unlawful detention of a relatively short duration is unconstitutional because "it nevertheless unreasonably extend[s] beyond the length necessary for its only legitimate purpose--the issuance of a citation . . . ." Id. at 1519 n. 8. Second, in United States v. Walker, 933 F.2d 812 (10th Cir. 1991), the court upheld a lower court's finding of a constitutional violation based upon an officer's extending the detention only a few seconds in order to ask the driver of the vehicle "if there were any weapons in the vehicle, if there were any open containers of alcohol in the vehicle, and if there was any controlled substance or paraphernalia of any kind in the vehicle." Id. at 814. These questions, the court reasoned, were unrelated to the speeding offense for which the officer stopped the vehicle, and, as the officer did not have any reasonable articulable suspicion that the vehicle contained alcohol, controlled substances, or paraphernalia, he did not have the legal authority to submit the driver of the vehicle to the extraneous questions. Consequently, even

though these questions took only a few seconds to ask, the officer had overstepped his constitutional authority by extending the purpose of the stop to interrogate the driver on unrelated matters.

In the present case, Trooper Singleton stopped Mr. Mondragon for going seven miles per hour over the speed limit and for changing lanes without using a turn signal. As a result of his observation of these alleged infractions, the officer had authority only to "request a driver's license and vehicle registration, run a computer check, and issue a citation." Guzman, 864 F.2d at 1519; Walker, 933 F.2d at 815. Mr. Mondragon produced his driver's license and registration. (R. 7). The Trooper then had authority to run a computer check and issue a citation. The record is void of any evidence that the Trooper ever made a computer check or issued a citation for the offense which justified the stop. As soon as the Trooper had taken possession of Mr. Mondragon's driver's license and registration, the Trooper expanded the scope of the stop to investigate "a burnt smell . . . similar to tobacco." (R. 7). From this point the Trooper never returned to the purpose of the stop to run a computer check and to issue a citation for speeding and failure to signal. The Trooper could lawfully deviate from this limited scope only if "(1) during the course of the traffic stop the officer acquire[d] an objectively reasonable and articulable suspicion that the driver [was] engaged in illegal activity, or (2) the driver voluntarily consent[ed] to the officer's additional questioning." Sandoval, 29 F.3d at 540.

A. TROOPER SINGLETON DID NOT HAVE AN "OBJECTIVELY REASONABLE AND ARTICULABLE SUSPICION" THAT THE TRUNK OR DUFFEL BAG CONTAINED CONTRABAND.

"Under the fourth amendment, a police officer is justified in stopping a vehicle when the officer observes the driver commit a traffic violation, or when the officer has a reasonable

articulable suspicion that the driver committed or is about to commit a crime, such as transporting drugs." State v. Humphrey, 937 P.2d 141 (Utah App. 1997) (Citing State v. Lopez, 873 P.2d at 1132; State v. Bello, 871 P.2d 584, 586 (Utah Ct.App.1994); and State v. Smith, 781 P.2d 879, 882 (Utah Ct.App.1989.)) Furthermore, reasonable suspicion "is based on objective facts . . . which are given due weight in light of the reliability of the information . . . and the reasonable inferences drawn from those facts . . ." State v. Humphrey, 937 P.2d 141, (Utah App. 1997) (citing Nguyen, 878 P.2d at 1186; White, 496 U.S. 330, 110 S.Ct. at 2416; and State v. Roth, 827 P.2d 255, 257 (Utah Ct. App. 1992)).

According to the Trooper's testimony, he allegedly smelled the odor of "fresh" burnt tobacco as he spoke with the driver of the vehicle, Mr. Mondragon. (R. 22). Mr. Mondragon disputes that this allegation gave the Trooper an "objectively reasonable and articulable suspicion" that illegal activity was occurring sufficient to authorize the trooper to deviate from the purposes of the stop and investigate the presence of tobacco. Nevertheless, even assuming that the Trooper had authority to perform this unrelated investigation based upon his observation of an odor of fresh tobacco smoke, this authority would have ended when, as the Trooper testified, he was told that one of the passengers was nineteen. (R. 7). Moreover, any authority the Trooper may have had to perform this unrelated investigation would have ended when the Trooper found and examined the identification card of one of the passengers which showed that the individual was of age to possess tobacco. (R. 16). Instead, the Trooper chose to disregard the evidence of the age of the passenger and searched the passenger compartment for tobacco. The Trooper failed to uncover any tobacco in the passenger compartment of the car. (R. 22).

Furthermore, after expanding the scope of the detention to investigate the source of an odor of tobacco, the Trooper further expanded the scope of the detention and refused to return to the purpose which justified the stop. During the search of the passenger compartment, the Trooper noticed spare light bulbs in the glove compartment. The Trooper then ordered Mr. Mondragon to "pop the trunk," ostensibly, at least, to assist in repairing the taillights with those bulbs the Trooper had observed. (R. 12). Unquestionably, the Trooper did not have authority to demand that the trunk be opened in order to inspect the taillights. His authority regarding the taillight infraction is merely to choose whether to write a ticket or not. Guzman, 864 F.2d at 1519; Walker, 933 F.2d at 815. Whether or not the Trooper could assist in repairing the taillights had absolutely no bearing on whether or not a signal infraction had occurred, as the occurrence of an infraction had already been determined when the Trooper allegedly observed the vehicle change lanes without signaling. Therefore, the Trooper's demand that the trunk be opened was yet another deviation from the initial scope of the stop. The Trooper's demand that the trunk be opened was neither based upon any reasonable suspicion nor upon any objective facts that the trunk contained contraband.

After Mr. Mondragon had complied with the Trooper's demand and had opened the trunk, the Trooper, yet again, expanded the scope of the stop by turning his attention from inspecting the taillights to a duffel bag contained in the trunk. (R. 12). And, yet again, the Trooper did not have authority to investigate the duffel bag. The Trooper had no objectively reasonable and articulable suspicion sufficient to deviate from the purpose of the stop. The Trooper could not see anything that would indicate the bag contained contraband; he did not smell anything to indicate that the bag contained contraband; and he did not discover anything that would indicate the bag contained

contraband. Therefore, unless Mr. Mondragon had consented to this and the previous extensions of his detention, the Trooper did not have the legal authority to deviate from the limited purposes of the traffic stop to extend the detention to question the passengers, search the passengers, search the passenger compartment, order that the trunk be opened to inspect the lights, inquire into the ownership of the bag, the contents of the bag, or whether he could search the bag. And, as will be shown below, consent was neither asked for nor given.

B. MR. MONDRAGON DID NOT GIVE HIS CONSENT TO THE EXTENSION OF THE SCOPE AND LENGTH OF THE TRAFFIC STOP.

As stated previously, the Trooper could lawfully deviate from the limited scope of the traffic stop only if "(1) during the course of the traffic stop the officer acquire[d] an objectively reasonable and articulable suspicion the driver [was] engaged in illegal activity, or (2) the driver voluntarily consent[ed] to the officer's additional questioning." Sandoval, 29 F.3d at 540. As already shown, the Trooper had absolutely no articulable suspicion to justify any action beyond requesting the license and registration, completing an NCIC. computer check, and issuing a citation for the observed speeding and signaling offenses. Therefore, unless Mr. Mondragon voluntarily consented to the Trooper's additional requests, questions, and searches, the evidence seized as a result of them must be suppressed.

"The government bears the burden on establishing consent, and voluntariness is a question of fact to be determined based on the totality of the circumstances." United States v. Mota, 864 F.Supp. 1123 (D. Wyo. 1994) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 227-32 (1973)). The Supreme Court has further stated that "in order to determine whether a particular encounter

constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officer's requests or otherwise terminate the encounter." Florida v. Bostick, 501 U.S. 429 (1991) (quoted in Sandoval, 29 F.3d at 540).

Under Utah law, even after an illegal search "it is possible to admit the evidence recovered as a result of the search . . .if both prongs of a two-part test are satisfied: (1) the consent was voluntarily given, . . . and (2) the consent was not obtained through 'exploitation' of the prior illegal police conduct." State v. Bello, 871 P.2d 584, (Utah App. 1994) (citing State v. Thurman, 846 P.2d 1256, 1262 (Utah 1993); and State v. Arroyo, 796 P.2d 684, 688 (Utah 1990)).

First, Mondragon's consent could not have been voluntary. Mondragon could not have felt free to terminate the encounter with Trooper Singleton under the circumstances confronting him at the time of the Trooper's initial request to search the passenger compartment. The Trooper had not even come close to finishing the legitimate purposes of the stop. The only action the Trooper had taken toward completing the purpose of the stop was to take possession of Mondragon's driver's license and registration. The Trooper had not given Mondragon a citation; the Trooper had not returned Mondragon's driver's license or registration; and the Trooper had not told Mondragon that he was free to leave. Furthermore, the Trooper testified that he "asked Mr. Mondragon to pop the trunk." (R. 12). The Trooper then observed that Mondragon "hesitated at first, then opened the trunk." (R. 12). Clearly, Trooper Singleton's implication is that Mr. Mondragon did not want to open the trunk but did anyway to comply with the Trooper's demand. Thus, the nonconsensual nature of the detention--and all the extensions thereof--cannot be mistaken as a valid consent.

Other courts have concluded that officers lacked consent to extend the scope of a traffic stop on much less evidence than exists in this case. For example, in Sandoval, the officer had placed defendant in his patrol car where he explained the need to obey the speed limit and then returned the defendant's documents. The defendant then asked the officer, "that's it?" Whereupon the officer replied, "no, might a minute." 29 F.3rd at 538-39. The court held that, under these circumstances "[n]o one . . . can reasonably view himself or herself as free to leave the patrol car." Id. at 542. The court further explained, "at no point did the nature of [the officer's] inquiries change the climate so that the reasonable listener would view participation in the exchange as freely terminable by leaving the patrol car." Id.

In Mota, the officer returned the defendant's documents before asking them if they had any drugs, guns, or large amounts of cash in the vehicle. However, the courts found that a voluntary encounter had still not arisen because "there were simply no words nor gestures of closure from which a reasonable listener could have determined that the reason for detention was over and a consensual encounter was beginning." 864 F.Supp. at 1128. "The patrolman did not pause in the conversation, he did not say anything to indicate his task was finished, and he did not move his body away from its leaning position on the [car]." Id. "Any reasonable listener, in fact any decent person, would not have felt free to go about his or her business if that meant driving away and injuring the person leaning up against their car." Id.

In the present case, Trooper Singleton had still not completed his duties relating to the traffic stop. He had not written a ticket; he had maintained possession of Mondragon's documents; and he had not told them they were free to leave. Thus, the constitutional violation in this case is much clearer even than those in Sandoval and Mota. In both of those cases, the

officer had finished writing the ticket and had returned the drivers' documents. Therefore, Trooper Singleton gave Mondragon absolutely no indications that the encounter had become consensual, and that Mondragon could leave. Since it is illegal to drive without one's license in one's possession, no reasonable citizen would consider leaving under the circumstances the Trooper posed for Mondragon. And, of course, it is beyond dispute that the Trooper did not ask Mondragon's permission to extend the scope of the stop to investigate the trunk of the car. Therefore, the Trooper clearly did not obtain Mondragon's consent to the unconstitutional deviations from the authorized purposes of the stop.

Second, as noted above, the only action the Trooper had taken toward completing the initial purpose of the stop was to take possession of Mondragon's driver's license and registration. Even if Mr. Mondragon had given a valid consent to the search, the State must prove that the consent was not invalidated by the Trooper's misconduct in expanding the scope of the stop. The State can meet this burden by showing that Mondragon's "consent cannot have been the product of police exploitation . . . 'or in other words "whether the 'taint' of the Fourth amendment violation was sufficiently attenuated to permit introduction of the evidence.'" State v. Bello, 871 P.2d 584, 588 (Utah App. 1994). If the search was neither based upon a reasonable articulable suspicion, nor valid consent, then there are three factors to consider in determining whether the taint of the Fourth amendment violation was sufficiently attenuated to permit introduction of the evidence: "(1) the 'purpose and flagrancy of the official misconduct,' (2) the 'temporal proximity' of the illegality and the consent,' and (3) 'the presence of intervening circumstances.'" State v. Zeigleman, 905 P.2d 883, (Utah App. 1995) (citing State v. Arroyo, 796 P.2d at 691 n. 4 (citing Brown v. Illinois, 422 U.S. 590, 603-04, 95 S.Ct. 2254, 2261-62, 45 L.Ed.2d 416 (1975)).

In the present case, Trooper Singleton's purpose in stopping Mr. Mondragon was to issue citations for driving seven miles-per-hour over the speed limit and for failing to signal prior to a lane change. As to the first attenuation factor, Mondragon contends that the flagrancy of the Trooper's misconduct is apparent: Under the circumstances which the Trooper searched Mondragon's car, any citizen whose daily routine may bring him into contact with a tobacco smoker and whom is in the presence of a minor would be subject to whatever search the Trooper cared to undertake. Again, cigarette ashes on the floor of a car driven by a grandparent taking his grandchild to lunch would provide grounds for a search of the entire vehicle and the persons therein. Such a conclusion shocks the conscience. As to the second attenuation factor, once the Trooper obtained Mondragon's driver's license and registration, the Trooper undertook his search for tobacco without undertaking any action toward completing the purpose of the stop. No time transpired between the Trooper's failure to complete the purpose of the stop and the searches. When he approached Mondragon and had obtained the license and registration, the Trooper did not initially ask about the traffic violations but instead chose to search the vehicle for tobacco. Once the Trooper failed to find tobacco in the passenger compartment, he did not check the license and registration for validity but chose to continue searching the vehicle without consent by commanding Mondragon to "pop the trunk." There was only an instant of time between the illegal expanding of the scope of the stop and Mondragon's alleged consent to search the passenger compartment. However, there was no consent either requested or obtained to search the trunk. As to the third attenuation factor, there were no intervening circumstances.

In addition, since the State failed to prove probable cause or exigent circumstances, the Trooper's violation of Mondragon's article I, section 14, Utah Constitutional rights demands

"exclusion of illegally obtained evidence [a]s a necessary consequence . . ." State v. Larocco, 794 P.2d 460, 472 (Utah 1990); State v. Bello, 871 P.2d 584, 589 (Utah App. 1994).

POINT III

(Appellants Cutler and Manzanares only)

THE INTERROGATION AND SEARCH OF CUTLER AND MANZANARES WAS INTRUSIVE, BEYOND THE SCOPE OF THE STOP, WITHOUT PROBABLE CAUSE AND A VIOLATION OF THEIR CONSTITUTIONAL RIGHTS AGAINST UNLAWFUL SEARCH AND SEIZURE.

The interrogation and search of Appellants Cutler and Manzanares was intrusive, beyond the scope of the stop, without probable cause and a violation of their constitutional rights against unlawful search and seizure.

Utah case law establishes that an officer cannot intrude on a passenger of a vehicle unless the officer has reasonable articulable suspicion of criminal activity. State v. Golina-Luna, 826 P.2d 652, 655 (Utah App. 1992) (once officer determined passengers of vehicle, pulled over for possible intoxication, were sober, officer exceeded authority by interrogating defendants without reasonable articulable suspicion of criminal activity). In State v. Johnson, 805 P.2d 761, 764 (Utah 1991), the Utah Supreme Court found that a warrants check on a passenger was unreasonable if the officer had not formed a reasonable articulable suspicion that the passenger was engaged in any criminal activity.

In the present case, the Trooper believed he smelled the odor of fresh burnt tobacco. (R. 22). The Trooper testified that according to Mondragon's identification, Mondragon was not old enough to possess tobacco. (R. 7). The Trooper inquired if anyone else in the car was old

enough to smoke. One of the Appellants stated that Cutler was old enough to possess tobacco. (R. 7).

The Trooper did not end his inquiry (see Point II), but the Trooper proceeded to search the vehicle for "contraband." When the Trooper frisked Cutler, he found a wallet and opened it to reveal a drivers license with a birth date of June, 6, 1972, making Cutler twenty three (23) years of age. The Trooper testified that he did not know what age Cutler was because the Trooper's math skills were not very good. (R. 16). The Trooper, while maintaining possession of Cutler's identification asked Cutler if he had any warrants. Cutler replied that he though he had one out of Salt Lake County. (R. 30). After Cutler was frisked, Cutler was ordered to the front of the vehicle and was not free to leave. (R. 33).

The Trooper inquired about Manzanares' identification. Manzanares did not have identification on him. However, the Trooper asked Manzanares if he had any warrants outstanding. Once Manzanares was frisked he was ordered to the front of the vehicle and was not free to leave. (R. 33)

In the above incidents the Trooper violated established Utah case law that prohibits an officer from intruding on passengers without reasonable articulable suspicion. In Johnson the Supreme Court stated "the leap from asking for the passenger's name and date of birth to running a warrants check on her severed the chain of rational inference from specific and articulable facts and degenerated into an attempt to support an as yet inchoate and unparticularized suspicion or hunch." State v. Johnson, 805 P.2d 761, (Utah 1991), Terry v. Ohio, 392 U.S. 1, 27 (1968).

The Appellants were passengers in a car driven by Appellant Mondragon. The Trooper pulled the car over for speeding and failure to signal, both valid traffic violations. However, the

Trooper expanded the scope of the stop immediately, see Point II. The Trooper did not have an articulable suspicion of serious criminal activity. What the Trooper had was a suspicion or hunch. The Trooper ignored the case law that governs traffic stops, for his suspicion or hunch. A practice that is in direct opposition to the case law established by the Utah Supreme Court. Johnson.

Under Article I Section 14 of the Utah Constitution Appellants' protection against warrantless searches were violated. The Utah Supreme Court established that a passenger has a right from warrantless searches and seizures. Johnson. In this case the Trooper violated the Appellants' rights. The Trooper had no articulable suspicion of a criminal activity, when he discovered Appellant Cutler was of age to possess tobacco. Further, the contraband of tobacco that the Trooper was searching for no longer existed since Appellant Cutler was of age to possess tobacco. Therefore, under Larocco the Trooper could not proceed against the Appellants, there was neither probable cause nor exigent circumstances, both being necessary for a warrantless search. The Trooper's intrusive actions violated the Appellants' rights under Article I Section 14 of the Utah Constitution, all evidence from the search, arrest and interrogations should be excluded. State v. Johnson, 805 P.2d 761 (Utah 1991), State v. Larocco, 794 P.2d 460 (Utah 1990) (Plurality opinion).

The Trooper's detention of the Appellants beyond what was reasonably related in scope to the traffic stop was not justified by an articulable suspicion that the Appellants had committed a crime or were engaged in any criminal activity. Both the Appellants' Fourth amendment rights were violated, and the evidence obtained pursuant to the arrest should be suppressed.

CONCLUSION

The findings of fact from the trial court could not be supported by the weight of evidence that was presented. The findings of fact should be found erroneous and reversed.

Trooper Singleton only had authority to obtain identification, run a computer check, and write a traffic citation. The Trooper unconstitutionally deviated from this authorized scope when he demanded that Mr. Mondragon open the trunk and, more especially, when he interrogated Mr. Mondragon regarding the ownership of the bag, its contents, and whether he would let the Trooper search it. As the Trooper did not have an objectively reasonable and articulable suspicion to support this additional intrusion and detention, and as the Trooper did not obtain Mr Mondragon's valid consent, the fruits of the illegal intrusion and detention must now be suppressed as fruits of the poisonous tree, Wong Sun, 371 U.S. 471 (1963), "without sufficient attenuation" to allow admission of the evidence, State v. Bello, 871 P.2d 584, 589 (Utah App. 1994) and as "a necessary consequence of police violations of article I, section 14" of the Utah Constitution. State v. Larocco, 794 P.2d 460, 472 (Utah 1990).

Further, the Trooper immediately focused his attention on the passengers Cutler and Manzanares. The Trooper's intrusive questioning and searches violated the passengers rights against warrantless search and seizure. State v. Johnson, 805 P.2d 761 (Utah 1991). As such any and all evidence from such intrusion and detention must be suppressed as fruits of the poisonous tree. Wong. Under Utah case law, evidence obtained from the Trooper's misconduct that resulted in the intrusive search and seizure of the Appellants must be excluded. State v. Bello, 871 P.2d 584, 589 (Utah App. 1994), State v. Larocco, 794 P.2d 460, 472 (Utah 1990).

RESPECTFULLY SUBMITTED this 24th day of September, 1997.

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CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, true and correct copies of the foregoing Appellant's Brief to the following:

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DATED this 24th day of September, 1997.

Candace S. Bridgess
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ADDENDUM

ADDENDUM A

A. After 1300 hours. 1330, around that time.
Q. Do you recall the weather conditions?
A. It was warm, dry.
Q. And did all this occur in Box Elder County?
A. Yes, sir, it did.
Q. You were working that day, I assume?
A. Yes, sir, I was.
Q. In a marked car and wearing a uniform?
A. That is correct.
Q. And I think this all started when you had occasion to pull over a vehicle that was ultimately found to contain these three individuals, one of them as the driver and two as passengers?
A. Yes, sir.
Q. Was there anyone else in the vehicle?
A. No, sir.
Q. What brought your attention to the vehicle?
A. I had just pulled up on the interstate. back on the interstate. I noticed the vehicle traveling in front of me. It was moving faster than the rest of the traffic. We were doing a saturation on Interstate 15 through a project with other states. We were stopping, you know, as many violators as we could to see if we could get the accident rate down in that 24 hour period, is what the goal was.

consider that throughout. We can argue that in closing. Just so I don't lose track of it. We take the position that at least two out of the three don't have standing. At the moment I'm not certain which of the two it would be. The third one may not.

THE COURT: All right. You may proceed.

MR. BUNDERSON: Thank you. I'll call Scott Singleton to the stand.

SCOTT SINGLETON,

called as a witness, being first duly sworn to tell the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BUNDERSON:

Q. Your name is Scott Singleton and you are a trooper with the Utah Highway Patrol, is that correct?

A. That is correct.

Q. I'll call your attention to the matter before the court and I guess I could almost just say tell us what happened, because you've gone through at least one preliminary hearing and prepared a couple of times to testify for this hearing, is that correct?

A. That is correct.

Q. What date did this occur on?

A. September 22nd, 1995.

Q. The time of day?

So I noticed the vehicle was moving faster than the rest of the traffic as it pulled onto the interstate. I began to pace the vehicle and I was pacing at 72 miles per hour in a 65 mile per hour zone. That's when it moved from the left lane into the right lane and it moved abruptly, without signalling.

Q. Where was this?

A. This was -- it first originated just south of the Perry rest area. And just before the Port of Entry the vehicle -- the vehicle stop occurred just a little bit north of the Port of Entry.

Q. Did you effect the vehicle stop right after the left to right abrupt lane change?

A. I did.

Q. Did the vehicle pull over in a regular fashion? You turned on your lights and it pulled over?

A. Yes, it pulled over to the right as it was supposed to.

Q. All right. Describe what happened from that point.

A. As I stopped it I only saw one occupant in the vehicle at first. As it stopped I noticed two others in the vehicle sit up. Then I exited my

vehicle, went up and approached the driver. I asked for identification, driver's license, registration. Both documents were produced.

Q. Who was the driver?

A. The driver was Mr. Mondragon over here.

Q. To whom was the car registered?

A. It was in his name also.

Q. Okay. I may have neglected to ask this, or I didn't ask it. Which direction was the car traveling?

A. Southbound.

Q. All right. Go ahead.

A. And as I was talking with the driver I could smell a burnt smell coming from the vehicle. It was similar to tobacco. I asked if -- I could see by Mr. Mondragon's driver's license that he wasn't old enough to possess tobacco.

Q. His age is what?

A. 19. I asked who was 19 in the vehicle and they claimed -- it was claimed that Mr. Cutler, I don't remember exactly who said it, but Mr. Cutler was 19 somebody said. That was brought to my attention. I asked if he had any identification to show that he was of that age and he said he didn't have any.

Q. Did Mr. Cutler at that time look to you like he was obviously over 19, like me, or did --

A. No. You know, to me he looks close to the age. Whether he could have been over or under, it was close.

Q. But in looking at him he could have been under 19?

A. If I were selling tobacco in the store I would definitely ID him because I couldn't tell one way or the other.

Q. Okay. What happened next?

A. I asked if there were any -- if they had tobacco in the vehicle, because it was really a strong fresh burnt smell. They said that they didn't, but someone in the car had been smoking the night before.

I asked if I could have permission to look in the car for tobacco. The driver consented and said it was fine.

Q. At this point where are all of these individuals?

A. Mr. Mondragon is in the driver's seat; Mr. Manzanares is on the passenger side; then Mr. Cutler behind the driver in the back seat.

Q. So nobody is out of the car at this point?

A. No. So then I did a terry frisk on them one at a time for weapons. I didn't find any. When I was frisking Mr. Cutler, I noticed that there was a wallet

A. Yes. According to Mr. Cutler the front ones worked and the rear ones didn't. That was different. We started to discuss about either the bulbs or the fuses. I noticed that they had bulbs for the turn signals in the glove box. I asked Mr. Mondragon to pop the trunk and we'd check out the bulbs. That's when I first noticed a tension, the way he paused, the way his posture changed. I could tell something was wrong.

He started a statement about the fuses. I asked him let's look at the bulbs in the trunk and see. you know, if we can fix those. We went back to the trunk and he popped the trunk. We tried to examine the bulbs but you needed a tool, more than what I had access to, to be able to get to where the bulbs are.

We had some discussion about the bulbs, that we couldn't get the bulbs out. And at the time I also noticed a green duffel bag there in the trunk.

Q. Let me ask you, up to this point had you made it clear that the vehicle wasn't going to drive back down the road without the taillights fixed?

A. I didn't.

Q. You hadn't said anything about that?

A. No, not out and out. I placed the other two

back in the vehicle while I was going to go back. That's how come the discussion about the bulbs. The vehicle is not going to go down the road without any taillights or brake lights or signal lights.

Q. That's what you were thinking, but you didn't express that yet?

A. No, I hadn't.

Q. And there was a green duffel bag in the trunk?

A. Yes.

Q. And that's here on the table today?

A. Yes. It struck me as odd that that was in the trunk when up in the driver's compartment there was really an absence of any kind of luggage or anything. They'd gone to Pocatello to drop off a friend and were on their way back. That really struck me as odd, because, I mean, there was nothing else put in the trunk except for this one green duffel bag and everything up front showed no luggage. There was a coat and a blanket and that was it.

I asked about the duffel bag, whose it was. Mr. Mondragon said that it belonged to everybody. They put their clothes in it on the way up to Idaho. I asked if there was any tobacco or contraband in the bag. Because of the strong smell

and the absolute absence of any smoking material in the driver's compartment, you know, it then made sense that the cigarettes could possibly be put there. So I asked if I could look in the duffel bag and he said, you know, that it was okay. He indicated that it was okay.

I had him step around the side of the vehicle and I unzipped the bag and when I unzipped the bag I could see a plastic sack and I could see what appeared to be a large quantity of marijuana.

Q. And indeed it turned out to be marijuana, is that correct?

A. Yes, sir.

Q. And there were other items, drug type items, in the duffel bag, I believe, is that correct?

A. That's correct.

Q. That's the basis of these charges?

A. That is correct, yes, sir.

Q. Is there anything we've charged them with that wasn't in the duffel bag?

A. Yes. Well, as far as that question, no. I didn't charge them with anything that wasn't found in the duffel bag. There were -- I'll explain. There were stamps, which turned out to be LSD, that were in the duffel bag, but they were in a pair of pants that

was separate from the rest of the items in the bag.

Q. Okay. As far as the search and seizure issue goes, you were focused on the duffel bag?

A. Yes, sir.

MR. BUNDERSON: Your Honor, for the purpose of this hearing I think we've completed our testimony. Just to follow through, of course, the charges are based on what was found in the duffel bag after it was unzipped.

THE COURT: All right. Cross-examination.

MR. BOUWHUIS: Thank you. At this time I intend to use the videotape of the stop to assist me in my questions.

CROSS-EXAMINATION

BY MR. BOUWHUIS:

Q. What I'm going to do, can you see this screen?

A. Yes. Not wonderfully, but I can see it okay.

Q. How about if I turn it a little bit more? How is that?

A. That's better.

Q. What we'll do is roll this tape and I'm going to pause it at certain sections and ask you some questions. It's a short tape. When I'm done with it I'll continue my questioning.

MR. BUNDERSON: It was a videotape made at the scene. We stipulate that this is Officer Singleton's videotape of some portions of the event. I'm not sure when it begins and ends. We made a copy and provided it to defense counsel.

MR. BOUWHUIS: By the way, I'm not asking that the content, the verbal content of the tape, be recorded by the court reporter.

THE COURT: I'll ask the reporter to simply record your questions and the witness's answers, but not the contents of the tape.

MR. BOUWHUIS: Thank you.

MR. BUNDERSON: Are you going to mark the tape itself?

MR. BOUWHUIS: When I'm done we'll do that.

(Tape played.)

Q. (BY MR. BOUWHUIS) At this point you discovered or were able to ascertain that Casey Cutler was of legal age to possess tobacco?

A. I discovered a driver's license, but I didn't really check the age. My math skills are not that good. It takes me quite a while to figure out what 19 is.

Q. We just heard a portion there, after you looked at the license, or it appeared you were looking

Q. So you didn't have a conversation right there about anything?

A. No. Not that I can remember, no.

Q. Thank you.

(Resume playing the tape.)

Q. (BY MR. BOUWHUIS) You pulled them over for speeding and for a turn signal violation?

A. Yes, sir.

Q. And in the course of questioning them you smelled the burnt tobacco?

A. A burnt smell which I assumed was tobacco, yes.

Q. You asked them if there was any tobacco in the car?

A. Yes.

Q. And you asked to search and did a search?

A. Yes, sir.

Q. And found no tobacco?

A. That's correct.

Q. Okay.

(Resume playing the tape.)

Q. (BY MR. BOUWHUIS) Let's stop it there. Do you recall him saying, and I couldn't hear it clearly, but he clearly hesitated there when you asked him to pop the trunk?

A. Uh-huh.

Q. And did he not say something about getting it checked in Salt Lake?

A. I honestly don't recall.

Q. You don't recall him saying that?

A. I do not.

Q. Let me rewind this real quick. I thought I heard it previously. Maybe I'm mistaken.

(Resume playing the tape.)

Q. (BY MR. BOUWHUIS) You don't recall what he said there?

A. I don't recall.

Q. You couldn't hear it?

A. I might have heard, but I don't recall it now.

Q. But he clearly didn't say okay, I'll pop the trunk, at that point?

A. No.

(Resume playing the tape.)

Q. (BY MR. BOUWHUIS) Right there, just so we can describe for the record, Mr. Mondragon popped the trunk?

A. Yes.

Q. And you were standing at the left rear -- excuse me, the right rear corner?

A. Yes.

Q. And he was to your left?

A. Yes, sir.

Q. And you popped the trunk and you both poked your heads into the trunk?

A. Uh-huh.

Q. And looked at the right taillight box, correct?

A. That's correct.

Q. And at that point you could see it would be difficult to access?

A. Yes, sir.

Q. That's why you said something like what?

A. That we'd have to tear the sucker apart. That's why I moved to the left side to see if it was the same.

Q. Could you tell if -- you said we'll have to tear the sucker apart. Did he say anything?

A. No, not that I remember.

Q. So you're the only one who said anything there?

A. Yes.

Q. There was no discussion about the taillight?

A. No. Well, yeah, he said something about not being able to get into it and then that's when I made

the statement, yeah, you'll have to tear the sucker apart.

Q. Okay. And then you immediately moved around to Mr. Mondragon's left, is that correct?

A. Yes, sir.

Q. And you looked into the trunk and you had a better view from the left?

A. A better view?

Q. Of the trunk area.

A. A better view of the left side. As far as the whole trunk goes, see, right in the very center of the trunk was a large speaker box. That consumed a lot of the center area of the trunk.

Q. Was that blocking your view of the duffel bag?

A. No. I could see the duffel bag when it was opened.

Q. You saw the duffel bag when you were on Mr. Mondragon's right?

A. Yes.

Q. But you moved around to his left?

A. When it was originally popped open I could see the speaker box and I saw part of the duffel bag.

Q. And at this point you asked him whose duffel bag that was?

A. Yes, sir.

Q. Did you think there might be something in the duffel bag to repair the taillights?

A. No. I was thinking, you know, because we had the strong smell and not even a cigarette butt in the vehicle, you know, that there was a possibility that contraband might be concealed back there.

Q. And you testified earlier that when -- that you stopped the car and I assume they had the window rolled down when you were talking to them?

A. Yes, sir.

Q. You noticed a fresh smell?

A. It was a recently burnt smell.

Q. You testified earlier that it was fresh?

A. Yes. Rather than something that had been stale. I smoked for a lot of years. You get in a car and they have that stale old smoke odor. This was fresh, you know.

Q. So you assumed at that point that they'd been smoking in the vehicle?

A. Yes, sir.

Q. Despite your search of the passenger compartment, you found no tobacco?

A. That's correct.

Q. When you saw the duffel bag in the trunk, it

was closed?

A. Yes, sir.

Q. Did it have a zipper on it?

A. Yes, sir.

Q. Did it have any kind of logo on it?

A. McGregor, I believe, was the logo.

Q. Let me back up. You retrieved from the driver, Mondragon, his driver's license and registration, correct?

A. Yes, sir, that's correct.

Q. Did those prove to be valid?

A. Yes, sir.

Q. You had pulled him over for speeding and a signal violation?

A. That's correct.

Q. At the point that you determined his driver's license and registration were valid, could you have issued a citation at that point?

A. When I determined that they were valid?

Q. Yes.

A. Yes, I could have issued a citation.

Q. Okay. At the point you concluded the search of the passenger compartment and found no tobacco, could you have concluded -- could you have issued a citation for the speeding and turn signal violation?

A. Yes, sir, I could have.

Q. Mr. Mondragon didn't appear to be impaired in any way?

A. No, sir.

Q. As far as you could tell from watching the videotape, at this point had you returned back to your squad car?

A. No, sir, I hadn't yet.

Q. You hadn't?

A. No, sir.

Q. So you were still holding the identification of Mr. Cutler?

A. Yes, sir.

Q. As well as Mr. Mondragon's driver's license?

A. And registration, yes, sir.

Q. And at the point that you are here, this point here, where you have the trunk open and you're asking about the duffel bag, you actually have their identification?

A. Yes, sir.

Q. Clearly they were not free to leave?

A. They wouldn't be free to leave, even if they had their items back, because of the mechanical condition of the vehicle.

(Resume playing the tape.)

true that -- I'll go through Mr. Manzanares first. You performed a pat down on him?

A. That's correct.

Q. And it is true after the pat down you ordered him to go around and stand in front of the car, is that correct?

A. That's correct.

Q. Okay. It's true that at that time he was not free to leave?

A. At that time, no.

Q. Okay. And is it also true that you expected him to stay there in front of the car?

A. That is correct, yes, sir. I mean, yes, ma'am.

Q. That's okay. And it's also true that you performed a pat down of Mr. Cutler, is that correct?

A. Yes, ma'am, it is.

Q. And on that you found a wallet?

A. Yes, ma'am.

Q. And you asked him to open it up?

A. Yes.

Q. And there was ID in it?

A. That is correct.

Q. And at that point you stated that you took possession of his ID, is that correct?

your pocket along with Mr. Mondragon's?

A. I placed them in my pocket. I'm not sure exactly --

Q. It was all in your possession?

A. Yes.

Q. And you ordered Mr. Cutler to go in front of the car also?

A. Yes.

Q. And Mr. Cutler was not free to go at that time?

A. Especially not when he told me he had a warrant.

Q. Okay. Let's go back to that. You asked him if he had a warrant?

A. That's correct.

Q. And you asked him if he had warrants after you took possession of his driver's license, is that correct?

A. While I had possession, yes.

Q. You didn't return the driver's license?

A. No, ma'am, I did not.

Q. And was he cooperative with you?

A. Yes.

Q. In fact, looking at the video, it seems like all three defendants were quite cooperative?

A. I didn't find any and I don't recall him pointing it out. I remember it being denied that there was any in the vehicle.

Q. Okay. And you requested Mr. Manzanares and Mr. Cutler, as well as Mr. Mondragon, to return to the vehicle after you searched it?

A. Yes.

Q. And your search resulted in no type of contraband?

A. There wasn't anything.

Q. And at that point, when you returned them back to the vehicle, you had possession of Mr. Cutler's ID and Mr. Mondragon's ID?

A. Yes.

Q. Mr. Manzanares didn't have ID, but you did request that information?

A. Yes.

Q. Why was that requested?

A. So I could check for validity, see if he was who he was and if he had any warrants.

Q. Is there any reason -- isn't it true that you had no articuable suspicion to believe that Mr. Manzanares had done anything criminal?

A. There was nothing. He had no identification and I wanted to check out the individual to see if he

was who he said he was.

Q. Okay. But there was -- you had no suspicion of criminal activity on Mr. Manzanares?

A. Not at the time, no.

Q. And other than the warrant that Mr. Cutler had stated, you had no suspicion of criminal activity at that point concerning him?

A. No.

Q. At that point you could have went back and checked the NCIC on Mr. Mondragon come back and written a citation, correct?

A. I could have. To state it correctly, I could have checked the information and written the citation.

Q. Okay. It's also true that you did not return Mr. Cutler's ID at any time, is that correct?

A. That's correct.

MS. BRIDGESS: I'm sure Mr. Bouwhuis wants to, but I would, Your Honor, like to also request that the tape be admitted as evidence for Mr. Cutler and Mr. Manzanares.

THE COURT: Do we have it marked yet?

MR. BOUWHUIS: No. I neglected to do that, Your Honor.

MR. BUNDERSON: I have no objection.

THE COURT: I'll ask the clerk to mark it as

ADDENDUM B

AMENDMENT XIII

Section
1 [Slavery prohibited]
2 [Power to enforce amendment]

Section 1. [Slavery prohibited.]
Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction

Sec. 2. [Power to enforce amendment.]
Congress shall have power to enforce this article by appropriate legislation

AMENDMENT XIV

Section
1 [Citizenship — Due process of law — Equal protection]
2 [Representatives — Power to reduce appointment]
3. [Disqualification to hold office]
4 [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid]
5. [Power to enforce amendment]

Section 1. [Citizenship — Due process of law — Equal protection.]
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws

Sec. 2. [Representatives — Power to reduce appointment.]
Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State

Sec. 3. [Disqualification to hold office.]
No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof But Congress may by a vote of two-thirds of each House, remove such disability

Sec. 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations, and claims shall be held illegal and void

Sec. 5. [Power to enforce amendment.]
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article

AMENDMENT XV

Section
1 [Right of citizens to vote — Race or color not to disqualify]
2 [Power to enforce amendment]

Section 1. [Right of citizens to vote — Race or color not to disqualify.]
The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude

Sec. 2. [Power to enforce amendment.]
The Congress shall have power to enforce this article by appropriate legislation

AMENDMENT XVI

[Income tax.]
The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration

AMENDMENT XVII

[Election of senators.]
The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years, and each Senator shall have one vote The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution

AMENDMENT XVIII

[REPEALED DECEMBER 5, 1933 SEE AMENDMENT XXI, SECTION 1]

Section
1 [National prohibition — Intoxicating liquors]
2 [Concurrent power to enforce amendment]
3 [Time limit for adoption]

Section 1. [National prohibition — Intoxicating liquors.]
After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail

(2) Persons convicted of a crime are bailable pending appeal only as prescribed by law 1988 (2nd S S)

Sec. 9. [Excessive bail and fines — Cruel punishments.]

Excessive bail shall not be required, excessive fines shall not be imposed, nor shall cruel and unusual punishments be inflicted Persons arrested or imprisoned shall not be treated with unnecessary rigor 1896

Sec. 10. [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons In other cases the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons In criminal cases the verdict shall be unanimous In civil cases three fourths of the jurors may find a verdict A jury in civil cases shall be waived unless demanded 1996

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay, and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party 1896

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed The accused shall not be compelled to give evidence against himself, a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule 1994

Sec. 13. [Prosecution by information or indictment — Grand jury.]

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature 1947

Sec. 14. [Unreasonable searches forbidden — Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized 1896

Sec. 15. [Freedom of speech and of the press — Libel.]

No law shall be passed to abridge or restrain the freedom of speech or of the press In all criminal prosecutions for libel the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted, and the jury shall have the right to determine the law and the fact 1896

Sec. 16. [No imprisonment for debt — Exception.]

There shall be no imprisonment for debt except in cases of absconding debtors 1896

Sec. 17. [Elections to be free — Soldiers voting.]

All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage Soldiers in time of war, may vote at their post of duty, in or out of the State, under regulations to be prescribed by law 1896

Sec. 18. [Attainder — Ex post facto laws — Impairing contracts.]

No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed 1896

Sec. 19. [Treason defined — Proof.]

Treason against the State shall consist only in levying war against it, or in adhering to its enemies or in giving them aid and comfort No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act 1896

Sec. 20. [Military subordinate to the civil power.]

The military shall be in strict subordination to the civil power, and no soldier in time of peace, shall be quartered in any house without the consent of the owner, nor in time of war except in a manner to be prescribed by law 1896

Sec. 21. [Slavery forbidden.]

Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within this State 1896

Sec. 22. [Private property for public use.]

Private property shall not be taken or damaged for public use without just compensation 1896

Sec. 23. [Irrevocable franchises forbidden.]

No law shall be passed granting irrevocably any franchise, privilege or immunity 1896

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation 1896

Sec. 25. [Rights retained by people.]

This enumeration of rights shall not be construed to impair or deny others retained by the people 1896

Sec. 26. [Provisions mandatory and prohibitory.]

The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise 1896

section (8). Each separate violation of this subsection is a third degree felony and is also subject to a civil penalty not to exceed $5,000.

(b) The procedure for determining a civil violation of this subsection shall be in accordance with Section 58-1-108, regarding adjudicative proceedings within the division.

(c) Civil penalties assessed under this subsection shall be deposited in the General Fund.

(12) (a) The failure of a pharmacist in charge to submit information to the database as required under this section after the division has submitted a specific written request for the information or when the division determines the individual has a demonstrable pattern of failing to submit the information as required is grounds for the division to take the following actions in accordance with Section 58-1-401:

(i) refuse to issue a license to the individual;

(ii) refuse to renew the individual's license;

(iii) revoke, suspend, restrict, or place on probation the license;

(iv) issue a public or private reprimand to the individual;

(v) issue a cease and desist order; and

(vi) impose a civil penalty of not more than $1,000 for each dispensed prescription regarding which the required information is not submitted.

(b) Civil penalties assessed under Subsection (a)(vi) shall be deposited in the General Fund.

(c) The procedure for determining a civil violation of this subsection shall be in accordance with Section 58-1-108, regarding adjudicative proceedings within the division.

(13) An individual who has submitted information to the database in accordance with this section may not be held civilly liable for having submitted the information.

(14) (a) All department and the division costs necessary to establish and operate the database shall be funded by appropriations from the General Fund.

(b) Funding for this section shall be appropriated without the use of any resources within the Commerce Service Fund.

(15) All costs associated with recording and submitting data as required in this section shall be assumed by the submitting drug outlet. 1996

58-37-8. Prohibited acts — Penalties.

(1) Prohibited acts A — Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute; or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II or a controlled substance analog is guilty of a second degree felony and upon a second or subsequent conviction is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(2) Prohibited acts B — Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this subsection;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations;

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, marijuana, if the amount is more than 16 ounces, but less than 100 pounds, or a controlled substance analog, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b).

(d) Upon a second or subsequent conviction of possession of any controlled substance by a person, that person shall be sentenced to a one degree greater penalty than provided in this subsection.

(e) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction the person is guilty of a third degree felony.

(f) Any person convicted of violating Subsection (2)(a)(ii) or (2)(a)(iii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(3) Prohibited acts C — Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (3)(a) is guilty of a third degree felony.

(4) Prohibited acts D — Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under Subsection (4)(b) if the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or post-secondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (4)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in a church or synagogue;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in a public parking lot or structure;

(ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i) through (viii); or

(x) with a person younger than 18 years of age, regardless of where the act occurs.

(b) A person convicted under this subsection is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this subsection, a person convicted under this subsection is guilty of one degree more than the maximum penalty prescribed for that offense.

(d) It is not a defense to a prosecution under this subsection that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6) Any person who attempts or conspires to commit any offense unlawful under this chapter is upon conviction guilty of one degree less than the maximum penalty prescribed for that offense.

(7) (a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(8) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(9) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(10) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

(11) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application. 1997

58-37-8.5. Applicability of Title 76 prosecutions under this chapter.

Unless specifically excluded in or inconsistent with the provisions of this chapter, the provisions of Title 76, Chapters 1, 2, 3, and 4, are fully applicable to prosecutions under this chapter. 1997

2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act in its review of agency adjudicative proceedings. 1996

2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court.

ADDENDUM C

FIRST DISTRICT COURT OF BOX ELDER COUNTY
STATE OF UTAH

STATE OF UTAH Plaintiff vs CASEY J. CUTLER ELMER R. MONDRAGON, JR. RONNIE J. MANZANARES Defendants	MEMORANDUM DECISION AND ORDER CASE NOS. 951000128 961000027 951000129

This matter comes before the Court pursuant to the Motions to Suppress filed by all three (3) defendants. The Court held oral arguments and received testimony and has reviewed memoranda submitted by counsel. The facts may be briefly summarized as follows:

On September 22, 1995, at approximately 1:30 p.m. Officer Scott Singleton was southbound on I-15 north of the Perry Port of Entry. He observed a vehicle traveling at an above average speed and paced the vehicle in his patrol car at a speed of 72 MPH in a 65 MPH zone. The vehicle made a sudden lane change from the left lane to the right lane without signaling. Trooper Singleton then pulled the vehicle over. During the discussion which followed, it was determined Elmer Mondragon was the owner/driver of the vehicle and that he had a valid driver's license. Additionally, it was determined that Casey J. Cutler was one of the passengers and there was an outstanding warrant for his arrest. The officer had the defendants assist him in testing the turn signals and brake lights and determined that neither the turn signals nor the brake lights were working on the rear of the vehicle, although apparently the turn signals did work on the front of the vehicle. Because the front lights worked, the officer theorized that a fuse was not out but that perhaps there was a problem

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with wiring or a light bulb. The defendant opened the trunk of the vehicle and it was determined that the tail lights were enclosed in such a way that tools would be required in order to gain access to the bulbs. At that time, a single duffle bag was observed in the trunk of the car and the officer asked Mondragon if he could look in the duffle bag. Mondragon said he could. The officer found a substantial quantity of marijuana in the bag.

There was clearly probable cause for the initial stop. Additionally, the officer appears justified in his conclusion that the vehicle should not proceed down the highway without turn signals or brake lights.

There are several aspects of this scenario which are troubling. The officer indicated that he smelled what he interpreted to be tobacco smoke in the car and that he thought that the occupants were under age. The driver's license of Casey Joe Cutler plainly showed him to be several years older than necessary to possess and smoke tobacco. Additionally, no tobacco was located in the vehicle until much later during an inventory search. There seemed to be some question whether the officer asked defendant Mondragon to open the trunk or whether he directed him to open the trunk.[1] In any event, Mondragon opened the trunk. Prior to opening the duffle bag, the officer did not have any articulable evidence that the bag was involved in any type of criminal activity.

After carefully considering the authorities cited by counsel and reviewing notes of the hearing, the Court is of the opinion that defendant Mondragon lawfully consented to a search of the duffle bag. It is true that the defendant was not free to leave at the time the officer requested permission to search the bag. However, the cases indicate there is no bright line nor is there any single factor which is dispositive in determining whether a consent is voluntary. In this case, the Court finds that the driver gave permission to look in the bag the first time such permission was requested. The request came after a reasonably brief

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[1]Defense counsel argue that the officer's entry into the trunk constituted nothing more than a fishing expedition. However, the officer testified that on numerous occasions he has assisted motorists with minor repairs, including changing fan belts. Because the front blinkers were functioning, the officer reasonably concluded that he may be able to resolve the mechanical problem for the defendant. Had the occupants of this vehicle been an elderly couple or a mother with young children, the officer would have been expected to provide the courtesy of attempting to repair a minor wiring or bulb problem. The fact that he attempted to assist these defendants is not viewed as a sinister act.

CASEY J. CUTLER
ELMER R. MONDRAGON
RONNIE J. MANZANARES
Case Nos. 951000128
951000127
951000128

CERTIFICATE OF MAILING

I do hereby certify that I mailed a true and correct copy of the Memorandum Decision and Order dated August 16, 1996, to Attorney Candace Bridgess, 2568 Washington #102, Ogden UT 84401; Attorney Michael Bouwhuis, 2568 Washington #102, Ogden UT 84401; and Attorney Jon Bunderson, 45 N 100 E, Brigham City UT 84302.

Dated August 16, 1996.

Deputy Clerk

detention. There is likewise an absence of any threats or promises concerning the bag. There is no evidence the officer engaged in any trickery nor is there any evidence that the defendant's mental state was impaired. The defendant's voluntary consent to search the bag was consistent with the defendant's prior behavior; i.e. he had been cooperative with the officer. For the foregoing reasons, the consent is adjudged voluntary and the Motions to Suppress are denied.

Dated this 16 day of August, 1996.

STATE OF UTAH
FIRST DISTRICT COURT
BRIGHAM CITY

Ben H. Hadfield
District Court Judge